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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK MCLAIN,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant and Respondent;

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Real Party in Interest and Respondent.

D074715

(Super. Ct. No. CIVDS1605772)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Gilbert G. Ochoa, Judge. Affirmed.

California Correctional Peace Officers Association and Chris Uyemura for
Plaintiff and Appellant.

Janie Hickok Siess and Patricia A. Chapman, for Real Party in Interest and
Respondent Department of Corrections and Rehabilitation.

No appearance for Defendant and Respondent State Personnel Board.

Plaintiff Mark McLain contends respondent the State Personnel Board (Board) prejudicially abused its discretion when it upheld his dismissal as a correctional officer (CO) of real party in interest and respondent California Department of Corrections and Rehabilitation (CDCR). Plaintiff contends that CDCR failed to prove he made a threatening statement to a supervisor about another CO, who had accused plaintiff of handing-off contraband to an inmate. Specifically, he contends the Board's finding he made the threatening statement is not supported by substantial evidence and the Board, in any event, failed to properly apply the various *Skelly*¹ factors in sustaining his dismissal.²

As we explain, we conclude that substantial evidence supports the finding plaintiff made a statement that constituted a "threat" as defined in the CDCR Operations Manual, portions of which were included in the administrative record (Manual). We also conclude the Board properly exercised its discretion in sustaining plaintiff's dismissal from his CO position with CDCR. Affirmed.

OVERVIEW

At all times mentioned, plaintiff was a civil service employee of the State of California (State), holding and occupying the position of CO since April 1996. CDCR

¹ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).

² Plaintiff does not challenge other findings of misconduct sustained by the Board, including, as discussed *post*, his failure to read post orders and to acknowledge the same; his leaving his post without notifying his supervisor or chain of command; and his failure to report outside business activities to the warden's office. The Board *also* relied on these additional acts of misconduct in sustaining plaintiff's dismissal from CDCR.

was plaintiff's appointing power. At the time of his dismissal, plaintiff was working at California Institution for Men (CIM) in Chino.

A. Notice of Adverse Action (NAA)

In early January 2014, CDCR issued the NAA pursuant to Government Code³ section 19574.⁴ CDCR alleged plaintiff engaged in the following misconduct:

1) On January 2, 2013,⁵ plaintiff left his post at Facility D and walked over to Facility B, where he met inmate Joseph E. Before leaving his assigned work-area, plaintiff "failed to inform [his] supervisor" or "anyone up the chain of [his] command," as required by the "post orders" for Facility D.

2) On January 2, after arriving at Facility B, CO David Montanez observed plaintiff handing inmate Joseph a "brown paper bag," which the inmate placed under his shirt. Montanez followed Joseph as he walked to a locker room — identified as

³ All further statutory references are to the Government Code unless noted otherwise.

⁴ Subdivision (a) of section 19574 provides: "The appointing power, or its authorized representative, may take adverse action against an employee for one or more of the causes for discipline specified in this article. Adverse action is valid only if a written notice is served on the employee prior to the effective date of the action, as defined by board rule. The notice shall be served upon the employee either personally or by mail and shall include: (1) a statement of the nature of the adverse action; (2) the effective date of the action; (3) a statement of the reasons therefor in ordinary language; (4) a statement advising the employee of the right to answer the notice orally or in writing; and (5) a statement advising the employee of the time within which an appeal must be filed. The notice shall be filed with the board not later than 15 calendar days after the effective date of the adverse action."

⁵ Unless otherwise noted, all further dates are to calendar year 2013.

Room 1 — located in the main corridor of Facility B, and watched him remove the bag from under his shirt and place it in a "black locker," which Joseph then locked.

Montanez ordered Joseph to stop, but the inmate left Room 1. Montanez, with the assistance of CO Robert Mahan, locked Room 1. After Room 1 was secured, Montanez, with the assistance of Lieutenant (and then-acting Captain) Todd Thomas, searched Room 1. Lieutenant Jason Lamboy, who joined the search, found a bag of tobacco in a locker in Room 1 (sometimes, tobacco incident). Applicable regulations define "contraband" as "anything which is not permitted, or received or obtained from an unauthorized source" (Cal. Code Regs. tit. 15, § 3000).

3) On or about January 24, plaintiff worked third watch at CIM. After the shift ended, plaintiff asked CDCR sergeant Jesus Borbon for a ride home. During the ride home, they spoke about the January 2 tobacco incident involving inmate Joseph. Plaintiff claimed the brown paper bag he handed Joseph "contained tennis shoes or words to that effect." Plaintiff, who knew Borbon and Montanez were friends, stated, "If I lose my job [over the tobacco incident], Montanez better watch his back, or words to that effect."

4) On March 21, special agents interviewed plaintiff at CDCR's Office of Internal Affairs (OIA). In connection with the interview, plaintiff was instructed to be "truthful and to give complete responses to all questions," which plaintiff acknowledged. During the interview, plaintiff made the following representations: "A. You [i.e., plaintiff] were asked the question: 'And when you first walked out of R&R [i.e., receiving and release], and you and Inmate [Joseph], did you hand him a brown paper bag?' You answered 'I did not. No sir.' [¶] B. You also denied providing contraband to [Joseph] when you stated

the following: 'I never introduced contraband never[,] or words to that effect. [¶] C. You were asked if you told Borbon 'how about that he (Montanez) better watch his back, you never made that statement?' You answered 'No Sir.' "

5) In December 2012, plaintiff was assigned to Facility D. The post orders for Facility D required that orders be read at least once each calendar month. Plaintiff assumed the post for Facility D, but failed to read the post orders prior to assuming that post, and failed to sign the acknowledgment form indicating he had read such orders.

6) In October or November 2012, plaintiff applied for a business license for a recording studio located in Riverside. Plaintiff received money in connection with this business. Plaintiff "rented out" the business to a friend, Samuel S., who charged a "fee to recording artists" who used plaintiff's business. Applicable regulations define "Incompatible Activity" in part as follows: "(b) Before engaging in any outside employment, activity or enterprise, including self-employment, the employee must submit a statement to his or her division administrator or to the warden or superintendent, naming the prospective employer, if any, the employer's address and phone number, and an outline of the proposed duties or activities" (Cal. Code Regs. tit. 15, § 3413). Plaintiff continually failed to submit such a statement regarding his outside business activities.

The NAA further provided that, pursuant to section 19574, plaintiff was being "dismissed from [his] position as a Correctional Officer" effective January 14, 2014; and that plaintiff was subject to adverse action based on the following subsections of section

19572⁶: "(d) Inexcusable neglect of duty; [¶] (f) Dishonesty[; ¶ and ¶] (t) Other failure of good behavior either during or outside of duty hours, which is of such a nature that it causes discredit to the appointing authority or the person's employment." The NAA also provided that adverse action was being taken against plaintiff based on section 19990, which in part provides that a "state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee."

The NAA set forth plaintiff's rights with respect to the proposed action, including to respond to the NAA and/or to appeal the proposed action to the Board, which appeal "shall be deemed to be a request for hearing or investigation as provided in [section] 19575."

B. Administrative Hearing

Plaintiff appealed the NAA to the Board. The matter came on for hearing between September 8 and 10, 2014, before Administrative Law Judge (ALJ) James M . Soboleski. The ALJ issued a 24-page proposed decision dated November 20, 2014.

The ALJ set out the issues to be resolved as follows: "1. Did Respondent [CDCR] prove the charges [set out in the NAA] by a preponderance of the evidence? [¶] 2. If Respondent proved the charges by a preponderance of the evidence, does [plaintiff's] conduct constitute a violation of . . . section 19572, subdivisions (d)

⁶ Section 19572 provides: "Each of the following [subdivisions, including those relied on by CRCR] constitutes cause for discipline of an employee, or of a person whose name appears on any employment list. . . ."

inexcusable neglect of duty, (f) dishonesty, (r) violation of the prohibitions set forth in accordance with . . . [s]ection 19990, and/or (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment[. Footnote omitted.] [¶] 3. If [plaintiff's] conduct violates . . . section 19572, what is the appropriate penalty?"⁷

Inexcusable Neglect of Duty

a. *Outside Employment*

The ALJ found that CIM had a policy requiring all staff to notify the warden's office about outside employment; that plaintiff acknowledged such a policy existed and his duty to advise the warden as much; and that plaintiff was concerned enough about complying with this policy that he sought the advice of Lieutenant Dirk Williams.

Plaintiff at the hearing testified that, when he spoke with Williams about this issue, CDCR community resource manager Howard Gaines was also present. Plaintiff testified that Williams equivocally stated he did not believe plaintiff needed to advise the warden about his business enterprise; that Williams gave plaintiff this advice because, according to plaintiff, his business enterprise "didn't affect [his] job duties or have anything to do with any[,] not illegal activities, but law enforcement activities"; that plaintiff recognized, "for instance," he was "not allowed to own [an] alcohol license because [he's] a peace officer"; that during their conversation, Williams did most of the

⁷ The ALJ noted that it construed the NAA's allegation that plaintiff also violated section 19990, preventing a state officer or employee from engaging in any employment, activity, or enterprise inconsistent with his or her duties as a state officer and employee, as coming within subdivision (r) of section 19572.

talking, while Gaines "just mostly agreed" with Williams; and that because he was not "moonlighting" and it was merely an "investment," both Williams and Gaines did not believe it was necessary for plaintiff to notify the warden about his recording-studio business.

Respondent CDCR called Williams in rebuttal. He testified at all times relevant, he was the public information officer (PIO) at CIM; that his job responsibilities as PIO included acting as the warden's "right-hand assistant"; that he was familiar with the policies of CIM regarding "secondary employment"; that there was "actually a form that the — the employee would fill out and submit . . . to the warden's office for receipt and review"; and that the warden "at the time issued out a memorandum . . . to all CIM employees . . . notifying [them] that if they were in secondary employment, they had to report it to . . . the warden's office." Williams estimated the warden circulated this memorandum sometime in 2012.

Regarding plaintiff, Williams recalled that they had a five to 10-minute conversation in the warden's secretary's office, but was uncertain whether Gaines was present at the time; that plaintiff "had some questions about . . . outside employment, whether or not he should have . . . disclosed it"; that plaintiff mentioned he had invested money into a business, but did not tell Williams the nature of the business; and that Williams advised plaintiff "to report it to the . . . the warden's office, via the memorandum that was available[,] to insure that he had no issues and to document his — his employment."

Williams further testified that as the PIO, plaintiff's disclosure did not satisfy the requirement that plaintiff notify the warden's office about his business enterprise, as plaintiff also needed to "fill out the documents and submit [them]." Williams noted that regardless of the nature of employment, it still needed to be reported; that he had no recollection of having any conversation with plaintiff regarding whether his employment involved alcohol; and that Williams advised plaintiff to report his business activities to "be on the safe side," as it was "[b]etter to be safe than sorry."

Gaines testified that at all times relevant, he was the community resources manager at CIM; that he had no recollection of being involved in a conversation with Williams or plaintiff regarding plaintiff's outside employment; and that if he had been involved in such a conversation, he likely would have remembered it.

Plaintiff in surrebuttal testified that Gaines was in fact present during his conversation with Williams; that the conversation took place in late 2012 or 2013, as plaintiff had invested in the recording business in 2012; and that plaintiff approached Williams because he did not know much about CDCR rules regarding secondary employment, and thus believed the PIO "would be a good place to start." Plaintiff testified he was not required to be at the business; that he merely had subleased the building he was leasing; and that he was not required to make any decisions regarding the investment. Plaintiff conceded he did not notify the warden's office or submit the form or forms to that office, as recommended by Williams.

Plaintiff disputed that Williams had advised him to submit the proper form or forms to the warden's office to "be on the safe side." Plaintiff instead testified: "He [i.e.,

Williams] . . . said the way everything was working out, that he didn't think — he didn't think at all that I would have to turn that in, but he wasn't sure. [Williams] is one of those guys that's not going to tell you — if he doesn't know anything, he's not going to tell you, yeah, you don't do it. He's one of those guys that if he's not sure, then maybe I should go somewhere else or — I mean, you know, but he wasn't sure."

Plaintiff further testified his understanding at the time of his meeting with Williams and Gaines regarding secondary employment was such employment only needed to be disclosed "if it had something to do with alcohol, tobacco, bars, firearm sales." At the hearing, however, plaintiff recognized that "[n]o matter what employment, investment, anything, you must inform your hiring authority."

The ALJ found that plaintiff sought to excuse his failure to notify the warden about his outside business activity by claiming it was merely an " 'investment.' " At the hearing, plaintiff was asked if he admitted to engaging in outside employment during his OIA interviews. Plaintiff in response testified, "No. It's not an employment, per se. It was an investment." When asked if he was "operat[ing] a business," plaintiff responded he was "not actually operat[ing]" a business, but rather he "subleased the building" to his friend Samuel, who in turn was operating a recording studio with paying customers, which started up in November 2011. Plaintiff, however, claimed he received "no financial benefit" from subleasing the building to Samuel, or any "profits" from Samuel's operation of the business.

The ALJ found plaintiff's testimony "disingenuous, especially in light of [plaintiff's] conversation with Lieutenant Williams," inasmuch as the ALJ also found

plaintiff devoted "time and effort" into "obtaining a business license and building lease, and subleased the building to [Samuel]," and when Samuel stopped making payments on the lease, plaintiff "was responsible for, and made the balance of, these payments" "not [as] a passive investor, but [as] a leaseholder and landlord," which activities the ALJ found were "reasonably considered 'employment.' " The ALJ thus concluded, "[Plaintiff's] failure to notify the warden was purposeful and intentional and supports a finding of inexcusable neglect of duty."⁸

b. Plaintiff's Failure to Read and Acknowledge Post Orders and Leaving His Post without Permission

The ALJ in the proposed decision noted that plaintiff conceded "not read[ing his] post orders," and thus, also not signing such orders, despite having about three weeks to do so; and that plaintiff also admitted he left his post on January 2 without advising his supervisor. The ALJ found plaintiff's actions were "knowing and intentional" and also constituted "inexcusable neglect of duty."⁹

c. Threat to Montanez

Borbon testified just as he was driving away from CIM at about 10:00 p.m. on January 24 he heard someone call out his name, which turned out to be plaintiff, who requested a ride to Redlands, where Borbon also lived. About three or four minutes into the drive, plaintiff initiated a conversation regarding the allegation he had handed-off

⁸ As noted *ante* (in fn. 2), plaintiff has *not* challenged this finding on appeal.

⁹ As noted, plaintiff also has not challenged this finding on appeal. (See fns. 2 & 8, *ante*.)

contraband to an inmate. Borbon testified he played "dumb" as plaintiff stated, "well you know, we're talking about your buddy Montanez, Officer Montanez. He [i.e., plaintiff] stated that if he got fired after what Montanez had stated or alleged or a memo that he had provided to — concerning the event that transpired in Central, that Montanez . . . better watch his back. That's exactly what he said."

When asked what plaintiff meant by this statement, over objection Borbon testified, "At the time I believed he was blowing off steam because of everything that was going on. And so I figured, okay, well, maybe, you know, they're going to get into it, argue, maybe fight. . . . So we continued to drive. And I explained to him, hey, refrain from any type of comments like that because I'm obligated to, you know, disclose that information to my supervisor if something does transpire at a later date." According to Borbon, plaintiff appeared "upset and slightly angry" when he made this statement. During their 20- to 25-minute drive to Redlands, plaintiff told Borbon he did not give Joseph contraband on January 2, but instead "some . . . shoes and tee shirts, State stuff . . . in a bag."

About two days after his conversation with plaintiff, Borbon saw Montanez at an off-duty charity event for a fallen CO. Without going into detail, Borbon then told Montanez "briefly what [had] happened" on his ride home with plaintiff. Borbon testified a few days thereafter, he called Montanez and "disclosed thoroughly" what plaintiff had said during their drive to Redlands. Borbon testified he made the disclosure to Montanez "as one friend to another, you know, [to] watch your butt. He's [i.e., plaintiff] making innuendoes that he's going to do some harm to him. I don't know to

what extent. And, you know, be careful." Borbon also relayed his view that plaintiff was "just blowing off some steam" when he made the statement, and denied ever telling Montanez that plaintiff wanted to "kill" Montanez.

When asked why he spoke to Montanez on two occasions about plaintiff's statement if plaintiff was merely "blowing off steam," Borbon testified: "The first one, again, was brief where there was a lot of people there, and I didn't want other people knowing [Montanez's] business. And the second one I spoke to him on the phone just exactly what was said in the car. That if [plaintiff] gets fired, Montanez should watch his ass. It was something really brief. It wasn't a grave nature. Just like between friends, hey, watch your butt. Officer over there is going to kick your butt[t]. It's — I didn't think he was going to carry out a viable threat to kill Montanez." Borbon, however, admitted that a "fight" could be considered a "threat."

Borbon testified Montanez did not make any statements suggesting he was "afraid for [his] life" or otherwise appear to act "scared" during their phone conversation. Borbon took no further action to report plaintiff's statement. When asked why not, Borbon testified, "Because, again, I — I felt that it wasn't — I just thought [plaintiff] was blowing off steam concerning what had transpired, you know. Like if you're on the line, oh, forget about — forget about that guy. I'm going to kick his butt later, you know, after work. I just thought he was blowing off steam, so I didn't take it as a viable threat." When asked why he told Montanez about the "threat" if he did not believe it was "viable," Borbon stated, "That's a good question. Don't know."

In March 2014, members of the OIA interviewed Borbon regarding plaintiff's statement about Montanez. After he was admonished, Borbon gave a statement without requesting representation. At that point in time, Borbon did not believe he had done anything wrong in not reporting plaintiff's January 24 statement about Montanez.

About a month later, OIA agents informed Borbon he was under investigation for failing to notify a supervisor regarding plaintiff's statement that Montanez "better watch his back" if plaintiff lost his job over the tobacco incident. Borbon requested representation for the second interview. After the second OIA interview, Borbon testified his interviewers "implied the word viable" with respect to the "watch your back" statement, which to Borbon meant: "That it could be carried out. A threat that could be carried out and do harm." As a result of his failure to report plaintiff's statement about Montanez, Borbon's pay was cut "five percent for three months."

Montanez testified that, during a charity event in Chino, Borbon "pulled [him] to the side" and warned him "to be careful" and to "[w]atch [his] back" because "[plaintiff] was going to kill [him]" if plaintiff was fired over the tobacco incident. During this conversation, Borbon stated he would follow up with Montanez, as Borbon then did not "feel comfortable" talking more about it as "there [were] too many people around."

When asked at the hearing how he interpreted the statement, "you better watch your back," Montanez testified he believed it was a "threat endangering [his] life" and it suggested he ought to "be careful around [his] surroundings."

Montanez testified about two days after they spoke at the charity event, Borbon called him and they again discussed plaintiff's "watch your back" statement. During this

second conversation, Montanez testified Borbon made the following statements: "He told me that he had [given] Officer McLain a ride home. He didn't have a ride, so he gave him a ride to go to his house. And during that ride, Officer McLain was agitated. He was mad. And he was telling Borbon that if he gets fired that he's going to kill me, and that somebody's going to hurt me, something in that nature."

Montanez further testified that he still felt threatened by plaintiff in late March 2013, at or near the time he met with OIA agents; that he did not tell agents during this interview that Borbon had remarked during the charity event plaintiff wanted to "kill" Montanez; and that the first time he ever made such a statement was at the administrative hearing.

Montanez testified that later in 2013, he drove to plaintiff's mother's home to look at a television and other electronic equipment plaintiff was selling. Montanez estimated he was with plaintiff at the home for about 20 or 30 minutes and ended up buying a television from plaintiff for \$400. During this interaction, Montanez did not feel threatened by plaintiff.

Plaintiff's version of events, including what he said to Borbon on the drive to Redlands, conflicted with Borbon's testimony. Plaintiff testified during the afternoon of January 24 he asked Borbon for a ride home so plaintiff could work the third shift and collect overtime; that as soon as plaintiff got into the car, Borbon asked plaintiff, and not vice versa, what was happening between him and Montanez; and that plaintiff told Borbon he was "very upset," as plaintiff "couldn't believe what was — what [he] was being accused [of]" At Borbon's request, plaintiff then told Borbon what had

happened on January 2 involving the alleged hand-off of contraband from plaintiff to Joseph. Plaintiff testified, "So I proceeded to explain to him what I was accused of. And I just — I — I basically was ranting and raving like — like a girl, I guess. I don't know. I was just that upset. I just couldn't believe it."

Plaintiff, however, denied ever threatening Montanez. When asked what he told Borbon, plaintiff testified, "I said, you need to — you need to tell Montanez that if I lose my job over this, he better watch himself, because I'm going to take his job." Plaintiff further testified when he made this comment, he was talking about filing a lawsuit against Montanez for "[d]efamation of character" because he believed he was being wrongly accused by Montanez. According to plaintiff, Borbon kept saying, "it's no big deal," to "let things go," and "[i]f you didn't do anything, it's not a big deal."

The ALJ found section 31040.3.4.1 of the Manual, as discussed in more detail *post*, defined a threat as a "verbal statement 'expressing the intent to harass, hurt, (or) take the life of another person.' " The ALJ also found plaintiff "was aware of CDCR's policy regarding threats, but still made the statement that Montanez 'better watch his back' if [plaintiff] lost his job. This statement falls within the definition of a threat set forth in Respondent's zero tolerance policy. [Plaintiff's] statement about Montanez was purposeful and intentional, and supports a finding of inexcusable neglect of duty."

d. *Contraband*

The ALJ found respondent CDCR failed to prove by a preponderance of the evidence that plaintiff on January 2 gave inmate Joseph contraband, namely a "zip lock bag of tobacco." In making this finding, the ALJ noted that plaintiff denied giving the

inmate anything, but testified he left his post and only spoke to the inmate about locating some office supplies. The ALJ further noted that, although Montanez did not know plaintiff and thus, had no reason to create or report false observations, there were several concerns when evaluating Montanez's observation and actions, including that he was busy escorting a dozen or so inmates when he saw what he believed to be a "handoff of contraband" between plaintiff and Joseph; that Montanez's attention was therefore "divided" and his view of the alleged handoff somewhat obstructed by a "holding cage," thereby casting some doubt on the accuracy of Montanez's perception of what took place, if anything; and that, after seeing what he believed was a handoff, Montanez did not stop or detain Joseph, but instead watched him from outside Room 1, rather than confronting the inmate inside the room or calling for backup to help him do so.

Also of concern to the ALJ was what he deemed "weak" evidence tying Joseph to the tobacco found in Room 1. Although Montanez stated he kept a visual on Joseph while the inmate was inside the room and saw the inmate place a brown paper bag inside a locker, Captain Thomas testified he searched the area of the room where Joseph allegedly had placed the brown bag and found no contraband or brown bag. The ALJ noted that the contraband was found only after a lock had been cut off a locker; that Montanez never mentioned a lock when he testified about his observation of Joseph in Room 1; and that Joseph "credibly testified" he did not have the combination to any of the locks on the lockers in Room 1, which testimony was not rebutted by CDCR.

Finally, the ALJ found the circumstances surrounding the perceived handoff between plaintiff and Joseph were "inconsistent with an effort by a CO to smuggle

contraband to an inmate." The ALJ recognized plaintiff was an experienced officer, knew contraband was banned, and knew of the presence of Montanez and the "line of inmates" he was escorting as plaintiff was talking to the inmate. Under such circumstances, the ALJ found it was "unlikely [plaintiff] would try to hand [Joseph] a bag of tobacco in an open hallway rather than finding an empty room to make such a transfer."

Dishonesty

The ALJ found respondent CDCR did not present any evidence of statements made by plaintiff during his OIA interview that were "false or dishonest." (§ 19572, subd. (f) [dishonesty].)¹⁰

Violations of Prohibitions in Section 19990

The ALJ noted that section 19572, subdivision (r), provides that an employee may be disciplined for "violating the prohibitions against incompatible activities set forth in . . . section 19990," which section precludes a state employee from engaging in any activity that is "inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee." (§ 19990.)

¹⁰ We note in passing that plaintiff during his March 21 OIA interview appeared to make a "false," as opposed to a "dishonest," statement, inasmuch as he was asked, "Q: You were asked if you told Borbon . . . 'that he (Montanez) better watch his back, you never made that statement?' " and plaintiff "answered 'No Sir,' " which was contrary to the finding of the ALJ. We nonetheless do *not* consider subdivision (f) of section 19572, or the alleged falsity of plaintiff's statement to OIA agents, as a basis to dismiss plaintiff from CDCR.

The ALJ found respondent CDCR failed to "present any evidence that subleasing a building for use as a recording studio" was "incompatible with or inimical with [plaintiff's] duties as a CO." As such, the ALJ dismissed this charge against plaintiff.

Other Failure of Good Behavior

The ALJ noted plaintiff also was charged with "other failure of good behavior that causes discredit to the appointing authority or the [plaintiff's] employment" under subdivision (t) of section 19572. The ALJ further noted such misconduct "must be of such a nature as to reflect on the employee's job"; that is, the "misconduct must: (1) bear some rational relationship to the [plaintiff's] employment; and, (2) be of such a character that it can easily result in the impairment or disruption of the public service. [Citations.]"

The ALJ found as follows that plaintiff's failure to notify the warden of his outside business interests violated subdivision (t) of section 19572: "CIM promulgated a policy requiring all employees to notify the warden of any secondary employment in advance. Advance notification of outside employment would permit the warden to evaluate whether the proposed employment or business activity violated Respondent's incompatible activity policy [footnote omitted], and whether it had any negative impact on the reputation of Respondent or its mission. [Plaintiff's] failure to provide the warden with notification of his business activities was related to the conditions of his employment, and, therefore, his employment. Additionally, by failing to notify the warden as required, [plaintiff] prevented the hiring authority from evaluating his secondary business and ensuring that it did not violate Respondent's incompatible activity policy or discredit Respondent or its mission."

The ALJ also found plaintiff's failure to read and acknowledge the post orders and his leaving his post on January 2 without notifying his supervisor separately violated subdivision (t) of section 19572, as such conduct was related to "his employment and was of such a character that could easily result in the impairment or disruption of the public service."

Finally, the ALJ found plaintiff's threatening remark about Montanez also violated section 19572, subdivision (t), as such a remark "raises concerns about the ability of the CO's to work together in a professional manner, and the willingness of CO's to respond to and protect each other in emergency situations."

Penalty

The ALJ found the "evidence did not prove two of the most serious charges, namely that [plaintiff] gave Inmate [Joseph] contraband or that [plaintiff] was dishonest during his OIA interview. However, the evidence presented proved four other charges against [plaintiff]: [plaintiff] violated CIM policy by engaging in an outside business without first notifying the warden; [plaintiff] failed to review his post orders to learn the full extent of his duties as the Education Officer; [plaintiff] left his assigned post and facility without permission; and most significantly, [plaintiff] made a threatening statement against a fellow officer in violation of Respondent's workplace violation policy."

The record shows the ALJ considered plaintiff's threat against Montanez to be the "most serious" of the charges proved against plaintiff, noting that "[p]risons are dangerous places"; that "CO's must have confidence they can rely on their fellow CO's

for assistance and backup"; that a threat by one CO toward another "can seriously undermine this confidence and unnecessarily increase the dangers in the work environment"; and that plaintiff not only failed to take responsibility for making the threatening remark, but instead "sought to minimize his action by testifying that he only planned to sue Montanez and take his job." As such, the ALJ concluded plaintiff's "threatening remark and failure to accept responsibility for it justify[d] a strong penalty."

The ALJ also found that plaintiff "acknowledged his failure to read his post orders and his decision to leave his post without authorization," and that plaintiff engaged in misconduct when he failed to notify the warden about his "outside business activities." Regarding the latter issue, the ALJ noted such misconduct, while less severe in nature than the threat to Montanez, was nonetheless noteworthy because plaintiff "again sought to avoid responsibility for this action by characterizing his business activities as an 'investment' and not 'employment.' "

Relying on *Skelly*, the ALJ concluded plaintiff's "various acts of misconduct caused harm to the public service," which warranted plaintiff's dismissal from CDCR.

C. Board Resolution and Order

The Board on April 16, 2015 "carefully considered" the November 20, 2014 proposed decision of the ALJ. The Board then adopted as its own the "findings of fact, determination of issues, and [p]roposed [d]ecision of the ALJ . . . as its Decision in the case"

D. Petition for Rehearing

Plaintiff petitioned the Board for rehearing, which it granted on July 7, 2015. Although not limiting the matters to be argued on rehearing based on the administrative record, the Board invited discussion on the following issues: "1. Whether there was substantial evidence supporting the finding that [plaintiff's] statement to Sergeant B[o]rbon, 'If I lose my job over this, Montanez had better watch his back[,] ' was a threat to physically harm Officer Montanez? The parties are directed to cite to the record to support their respective positions. [¶] 2. Respondent's threats and violence policy defines a threat as a statement 'intended to intimidate.' Does Respondent need to prove that [plaintiff] made the statement with the intent to intimidate in order to sustain Respondent's charges against [plaintiff]? [¶] 3. What is the appropriate penalty for the proven misconduct?"

The Board on January 7, 2016, issued an order affirming its April 16, 2015 decision. In so doing, the Board in its January 7 decision and order found in part as follows: "The Proposed Decision [adopted by the Board on April 16] found that [plaintiff] failed to read and acknowledge his post orders, left his post without advising his supervisor, and made a statement that was intended or reasonably perceived as a threat against another correctional officer. [Plaintiff] filed a Petition for Rehearing principally asserting that the Administrative Law Judge (ALJ) erroneously interpreted [plaintiff's] statement as a threat when it was simply a shortsighted utterance made while [plaintiff] was upset and venting his frustration. The Board granted the Petition for Rehearing to allow the parties to argue the case with particular discussion on whether

[plaintiff's] statement was a threat directed at another officer. After reviewing the entire record and hearing the arguments proffered by the parties, the Board finds no reason to disagree with the ALJ's findings of fact and ultimate conclusion that [plaintiff's] comment was indeed a threat.

"The Board finds that [plaintiff's] statement to Sergeant Jesus Borbon (Sgt. Borbon) that '[i]f I lose my job over this, [CO] Montanez (Officer Montanez) had better watch his back' amounts to a threat of possible violence or harm. [Plaintiff] does not dispute that he made a statement after learning that Officer Montanez was the reason for the investigation into [plaintiff's] conduct. [Plaintiff] explains that he merely meant he would go after Officer Montanez's job and did not mean any actual violence. This assertion is not supported by the evidence. In particular, Sgt. Borbon was sufficiently concerned about [plaintiff's] intent when he made the statement. Sgt. Borbon testified that he understood [plaintiff's] statement to mean that [plaintiff] was going to fight Officer Montanez if he lost his job. Sgt. Borbon took [plaintiff's] comments seriously as to warn [plaintiff] that he would have to report [plaintiff] if anything happened. Sgt. Borbon also alerted Officer Montanez of [plaintiff's] statements and followed up with a phone call. [Plaintiff] admitted to raving and ranting 'like a girl' and that he explicitly instructed Sgt. Borbon to warn Officer Montanez. Further, after being warned by Sgt. Borbon that he may have to report him if he acted on his actions, [plaintiff] changed the topic of conversation rather than correct Sgt. Borbon regarding his alleged intention that [plaintiff] would sue Officer Montanez if he lost his job.

"[Plaintiff's] explanation that he was simply blowing off steam as a result of false allegations does not excuse or lessen the severity of his statement. In today's volatile world, ill statements regarding the well-being of another employee cannot be condoned or tolerated. Any statements that are indicia of a threat must be taken seriously by employers. This is especially true for correctional institutions where officers and other employees have to rely on each other to ensure their safety and well-being. Threatening remarks from one officer to another likely diminish the expectation of safety and dependability of those working within a prison environment.

"Moreover, [plaintiff] is a peace officer who is held to a higher standard of conduct. [Citation.] The Code of Ethics as found on the Commission on Peace Officer Standards and Training website provides[,]' I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life.' [Citation.] The Board is not blind to the fact that officers are humans and as such are fallible like anyone else. Mistakes are made and will be made. Nonetheless, because officers are held to a higher standard of conduct, they are often held accountable for acts or omissions that may very well be forgiven for non-peace officers. So while [plaintiff] was understandably upset with the investigation and possible disciplinary action to follow, it is not unreasonable to expect that he would conduct himself in a professional manner and certainly not utter threats of possible violence or retribution. Dismissal is therefore the appropriate penalty

in this instance given the severity of [plaintiff's] remarks and his continued failure to take responsibility for his actions."

E. Petition for Writ of Mandate

Plaintiff in April 2016 filed a verified petition for writ of mandate alleging Respondent CDCR "committed a clear abuse of discretion because no substantial evidence exists to support the allegations against [plaintiff]. Nor does substantial evidence exist to determine that the penalty of dismissal [was] appropriate."

Plaintiff thus requested relief as follows: 1) for a writ of mandate directing respondent to set aside its January 2016 decision and order adopting the ALJ's decision sustaining the NAA; 2) for all back pay and interest, lost employee benefits, and other rights owed to him as a civil servant with the State; 3) for his reasonable attorney fees and costs of suit; and 4) for any other relief the court deemed proper.

The trial court, after considering the administrative record, the parties' briefs, and oral argument, in late August 2017 denied "in its entirety" plaintiff's mandate petition. In its 16-page ruling, the court noted that plaintiff "only dispute[d] the finding that he made the threat against Montanez to Sergeant B[o]rbon, and [did] not challenge the other adverse findings, which the Board also upheld. [Plaintiff] asserts no substantial evidence supports the finding that [he] made a 'threat,' and even if a threat was made the Board abused its discretion by sustaining the dismissal."

Regarding plaintiff's contention CDCR failed to establish a "threat" under its workplace violence policy, the court cited to section 31040.3.4 of the Manual, which provided CDCR had a " 'zero tolerance policy for workplace violence' " and would

" 'respond to any acts or threats of violence with appropriate administrative or legal remedies.' " After citing to other provisions in the Manual defining the words "threat," "intimidate," and "state workplace," discussed *post*, and based on its review of the testimony of plaintiff, Borbon, and Montanez summarized *ante*, the trial court found CDCR's workplace violence policy did not "seem to expressly limit discipline to threats made at a 'State Workplace,' " as plaintiff had argued (and as he argues in this appeal); but instead is "intended to promote safety at the workplace, *but does not expressly limit its applicability to conduct elsewhere*. It seems somewhat absurd to excuse a threat to harm an employee because of the location where the threat [was] made. Therefore, the Court reject[s] [plaintiff's] argument that the conduct is not subject to discipline because it was made during a commute home from work."

Regarding plaintiff's contention there was no "threat" as defined in the Manual, the court noted the conflict in the testimony between Borbon and plaintiff regarding what plaintiff actually had said; how the ALJ had determined Borbon's credibility had exceeded plaintiff's, inasmuch as Borbon " 'had no motive to slant his testimony against [plaintiff]' "; Borbon " 'warned Montanez of [plaintiff's] threatening remark shortly after [plaintiff] made it' "; and unlike Borbon, plaintiff was " 'appealing a dismissal, and therefore ha[d] reason to explain away or minimize any conduct that could be deemed threatening.' "

The court ruled plaintiff's contention he did not threaten Montanez with the "watch your back" statement was "patently absurd," noting plaintiff was then "upset and angry

over a false accusation," and "[w]hy else would one make [such a] remark?" The court thus found the Board's findings on the threat issue was supported by substantial evidence.

Based on this finding, the court further found the penalty of dismissal was appropriate "considering all the circumstances," noting: "correctional officers work in a unique environment where they need to back each other up. If there is a question as to whether they will do that, the results can be seriously problematic and violent consequences can result."

DISCUSSION

A. *Guiding Principles*

The Board is an administrative agency with adjudicatory powers, pursuant to the California Constitution. (Cal. Const., art. VII, §§ 2 & 3.) When the Board reviews disciplinary actions, it acts "much as a trial court would in an ordinary judicial proceeding [It] makes factual findings and exercises discretion on matters within its jurisdiction . . . [and] [o]n review the decisions of the Board are entitled to judicial deference." (*Dept. of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823 (*Parks & Recreation*).) If an employee such as plaintiff here challenges the Board's decision by filing a petition for writ of administrative mandate, the superior court must defer to the Board's factual findings if they are supported by substantial evidence. (Code Civ. Proc., § 1094.5, subd. (c); *State Personnel Bd. v. Dept. of Personnel Admin.* (2005) 37 Cal.4th 512, 522; *Skelly, supra*, 15 Cal.3d at p. 217, fn. 31.) "The review is to be limited to considerations of whether the board exceeded its jurisdiction, committed errors of law, abused its discretion, or made findings unsupported by substantial

evidence. [Citations.]" (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 870 (*Wilson*).)

On appeal from the superior court's judgment, an appellate court is not bound by the superior court's determinations. Instead, we review the Board's decision, applying the same standard of review the superior court applied. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584 (*Youth Authority*); *Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 758; *Wilson, supra*, 58 Cal.App.3d at p. 870.) Accordingly, we too must accept the Board's factual findings if supported by substantial evidence. (*Valenzuela v. State Personnel Bd.* (2007) 153 Cal.App.4th 1179, 1184 (*Valenzuela*); *Parks & Recreation, supra*, 233 Cal.App.3d at p. 823.)

"When the standard of review is the substantial evidence test, . . . it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. [Citations.]" (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335–336.) Like the trial court, we do not reweigh the evidence on review. (*Youth Authority, supra*, 104 Cal.App.4th at p. 584; *Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 701 (*Camarena*).) Instead, we review all the evidence, including that which detracts from the evidence supporting the Board's determination, but accept all reasonable inferences favorable to the Board. (*Youth Authority*, at pp. 584, 586; *Valenzuela, supra*, 153 Cal.App.4th at p. 1184; *Parks & Recreation, supra*, 233 Cal.App.3d at p. 823; *Camarena*, at p. 701.) Substantial evidence is relevant, reasonable, and credible evidence that a reasonable person might accept as adequate to support a conclusion. (*Youth Authority*, at pp. 584–585.)

On questions of law, we of course exercise independent judgment. (Code Civ. Proc., § 1094.5, subd. (b); *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) But the Board's interpretation of governing statutes is entitled to great weight and respect even if not necessarily to deference. (*California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1611 (*Dept. of Corrections*).)

B. *Analysis*

1. Substantial Evidence

As summarized *ante*, we have independently reviewed the administrative record and find more than sufficient evidence to support the ALJ's finding, as adopted by the Board, that plaintiff made the statement to Borbon that Montanez "better watch his back" if plaintiff lost his job over the tobacco incident. Indeed, the record shows that plaintiff was "very angry" on January 24 when he made the statement to Borbon, after being — in plaintiff's view — wrongly accused of handing-off contraband to an inmate; that plaintiff knew Borbon and Montanez were friends when plaintiff asked Borbon for a ride home and made this statement; that about three or four minutes into the drive, plaintiff brought up the subject of the January 2 tobacco incident; that Borbon merely played "dumb," as he had heard about the incident, but wanted to hear what plaintiff had to say about it; that when plaintiff commented Montanez "better watch his back" or "ass," as Borbon testified, Borbon cautioned plaintiff to refrain from making such comments as Borbon was a supervisor and would be "obligated to . . . disclose that information to [his] supervisor if something [did] transpire at a later date"; that plaintiff appeared "upset" when he made the comment about Montanez; that Borbon figured plaintiff and Montanez

"maybe, you know, they're going to get into it, argue, maybe fight"; and that Borbon was certain plaintiff had said Montanez "better watch his back" if plaintiff lost his job.

In addition, a few days after plaintiff made the statement, Borbon reached out to Montanez at a charity event and, without then going into too much detail, told Montanez about his conversation with plaintiff during their drive to Redlands. The record shows Borbon then was concerned enough about plaintiff's statement that he called Montanez a few days later and "disclosed thoroughly" what plaintiff had said. On questioning, Borbon testified he followed up with Montanez after the charity event because, "as one friend to another," he wanted Montanez to be "careful," to "watch [his/Montanez's] butt" because plaintiff was "making innuendoes that he's going to do some harm to [Montanez]."

The record shows Montanez confirmed he had two conversations with Borbon and Borbon told him plaintiff had said Montanez had "better watch his back" if plaintiff lost his job as a result of the investigation of the tobacco incident.

As a court of review, it is not our role to reweigh the evidence or the credibility of witnesses in evaluating the administrative record to determine whether it contains sufficient evidence to support a contrary finding. (See *Youth Authority, supra*, 104 Cal.App.4th at p. 584.) In light of our conclusion that there is more than sufficient record evidence to support the finding plaintiff told Borbon that Montanez "better watch his back" if plaintiff lost his job, we reject this claim of error.

2. Threats and Intimidation

As he did in the trial court, plaintiff next contends that, even if there was substantial evidence to show he made the statement as communicated by Borbon, it was not a "threat" within the meaning of the Manual because CDCR's workplace violence policy allegedly "only appl[ies] to threats made at the workplace."

Generally, the same principles of construction and interpretation applicable to statutes are used in the interpretation of administrative regulations. (See *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710–1711.) The interpretive task is to determine the intent of the adopting authority. As is true in statutory interpretation, we first look to the language of the regulation. If its words, given their usual and ordinary meaning, are clear and unambiguous, we presume the adopting authority meant what it said and the plain language of the regulation applies. If the words are unclear or ambiguous, we examine the context in which the language appears using the interpretation that best harmonizes the statute internally and with related statutes. We consider the core objective of the regulation (see *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 193 (*Zamudio*)), its history, and background. (See *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129), superseded by statute on another ground as stated in *Arias v. Superior Court (Angelo Dairy)* 46 Cal.4th 969, 982.) If possible, every word, sentence, and phrase of a regulation is given significance. (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32.)

Key to the instant case, we do not interpret regulations in a manner that results in absurd consequences or defeats the core purpose of their adoption. (See *People v. Souza*

(1993) 15 Cal.App.4th 1646, 1652 (*Souza*).) Although plaintiff ignores this rule on appeal, we recognize that the "administrative construction of a regulation by the agency charged with its enforcement and interpretation is entitled to great weight. Accordingly, courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Maples v. Kern County Assessment Appeals Bd.* (2002) 96 Cal.App.4th 1007, 1015 (*Maples*).)

Turning to the instant case, the Manual¹¹ defines a "threat" as follows: "An action (verbal, written, or physical) that is intended to intimidate by expressing the intent to harass, hurt, take the life of another person, damage or destroy property, including threats made in jest but which others could perceive as serious." (Manual, § 31040.3.4.1.) Further, the Manual defines "intimidate" to mean: "To make afraid, frighten, alarm or scare; forcing action or inaction by inducing concerns for one's safety by means of any physical action and/or verbal comment."

We conclude under the circumstances of this case that plaintiff's statement to Borbon during their drive to Redlands that Montanez "better watch his back" if plaintiff lost his job as a result of the tobacco incident constituted a "threat" against, and was intended by plaintiff to "intimidate," Montanez within the meaning of section 31040.3.4.1 of the Manual. As we have already noted, plaintiff made the remark to Borbon, whom plaintiff knew was friends with Montanez, almost immediately after plaintiff got into

¹¹ We note the 2018 version of the CDCR Manual uses the same definitions of the words "threat," "intimidate," and "State Workplace" as the version of the Manual included in the administrative record.

Borbon's car, and at a time when plaintiff was very angry and upset over the accusation by Montanez that he had handed-off contraband to an inmate. Plaintiff also stated Borbon should convey his statement to Montanez, which Borbon did on two occasions a few days after plaintiff made it. The record also shows Montanez initially was concerned about his safety after learning about the statement, a concern also shared by Borbon.

We further conclude the word "threat" is *not* limited to, or in any way defined by, a "state workplace" as plaintiff argues. "State workplace" is defined in section 31040.3.4.1 of the Manual to mean: "Anywhere a State employee is conducting authorized State business, or enroute [*sic*] to and from (excluding normal commute) a location where State business is or will be conducted."

We note CDCR does not interpret its own regulation to limit a "threat" for purposes of the Manual only to statements made, or conduct engaged in, at the workplace. (See *Maples, supra*, 96 Cal.App.4th 1015 [noting courts give "great weight" to the administrative construction of a regulation by an agency "charged with its enforcement"]; see also *Dept. of Corrections, supra*, 121 Cal.App.4th at p. 1611.) Nor would the interpretation proposed by plaintiff fulfill the core objective of the regulation (see *Zamudio, supra*, 23 Cal.4th at p. 193), which is workplace violence prevention.

As already noted, CDCR has a "zero tolerance policy" for workplace violence: "It is the policy of the CDCR to provide all employees and members of the public with a safe and healthful work environment. Violent acts or threats against another person's life, health, well being [*sic*], family, or property infringe upon CDCR's right and obligation to provide a safe workplace for its employees. CDCR has a zero tolerance policy for

workplace violence and will respond to any acts or threats of violence with appropriate administrative or legal remedies." (Manual, § 31040.3.4.) Limiting a "threat" to harm another only to statements or conduct occurring at the workplace would be inimical to CDCR's zero tolerance policy of preventing workplace violence.

Moreover, if we adopted plaintiff's interpretation of the applicable provisions in the Manual, CDCR would be unable to regulate, discipline, or pursue "appropriate administrative or legal remedies" against a CDCR employee, such as plaintiff in the instant case, who makes a threatening remark in a car to a *supervising* CDCR employee about a third CDCR employee regarding an incident that took place at one of CDCR's prisons. Like the trial court, we conclude such an interpretation would lead to an absurd result. (See *Souza, supra*, 15 Cal.App.4th at p. 1652.)

3. Penalty

Finally, we conclude plaintiff's dismissal was not improper. "The propriety of a sanction imposed by an administrative agency is a matter resting in the sound discretion of that agency, and that decision will not be overturned absent an abuse of discretion. [Citations.] 'Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed.' [Citations.] This rule is based on the rationale that 'the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.' [Citation.]" (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692, fn. omitted (*Hughes*); see *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46 (*Deegan*) [noting "[n]either the trial court nor the appellate court is

entitled to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed"].)

Here, the record shows the Board "carefully" considered the issue of punishment not only once, but twice, as this was also an issue in the petition for rehearing granted by the Board in July 2015. Relying on the *Skelly* factors, the Board concluded the threatening remark was of a "serious nature," ruling as follows: "Of the charges proven, [plaintiff's] threatening remark about Montanez is the most serious. Prisons are dangerous places, and supervisors must rely on CO's to work with each other cooperatively to minimize the dangers to staff. Additionally, CO's must have confidence they can rely on their fellow CO's for assistance and backup. Threats by a CO toward another CO can seriously undermine this confidence and unnecessarily increase the dangers in the work environment. [Plaintiff] also failed to acknowledge the true nature of his statement about Montanez and sought to minimize his action by testifying that he only planned to sue Montanez and take his job. [Plaintiff's] threatening remark and failure to accept responsibility for it justifies a strong penalty.

"[¶] . . . [¶]

"[¶] . . . [Plaintiff] denied threatening Montanez and sought to minimize his statement about Montanez by stating he would sue Montanez if he lost his job. [Plaintiff's] testimony suggests he does not appreciate the serious nature of his threatening remark, and supports the conclusion that there is a reasonable likelihood of reoccurrence. [¶] . . . [Plaintiff's] threat against Montanez was a serious breach of

Respondent's work place violence policy. . . . Accordingly, the penalty of dismissal is just and proper."

We conclude that the Board did not abuse its discretion in finding plaintiff's misconduct, including his threat of "possible violence or harm" against Montanez in violation of respondent's workplace violence policy, warranted his dismissal from CDCR.¹² (See *Hughes, supra*, 68 Cal.App.4th at p. 692; *Deegan, supra*, 72 Cal.App.4th at p. 46.)

DISPOSITION

The judgment denying plaintiff's writ of mandate is affirmed. Respondent CDCR to recover its costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

DATO, J.

¹² In concluding dismissal was the appropriate penalty, as we have noted the Board also relied on other acts of misconduct by plaintiff, including his decision to leave his post without authorization to search for office supplies; his failure to read and acknowledge post orders; and his noncompliance with CIM policy regarding reporting of outside business activities.